BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAVID LAMONT	)	
Claimant	)	
VS.	)	
	)	Docket No. 262,823
CAS CONSTRUCTION, INC.	)	
Respondent	)	
AND	)	
	)	
BUILDERS' ASSOCIATION SELF-INSURERS' FUND	)	
Insurance Carrier	)	

ORDER

Respondent appealed the April 5, 2001 preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict.

ISSUES

Judge Benedict granted claimant's request for continued medical treatment with orthopedic surgeon Brett E. Wallace, M.D., but denied claimant's request for temporary total disability compensation. Respondent contends claimant failed to prove that his left knee injury arose out of and in the course of his employment with respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the preliminary hearing record and the briefs of the parties, the Appeals Board finds that the Administrative Law Judge's (ALJ) Order should be affirmed.

There is some confusion about claimant's date of accident. Claimant first sought medical treatment on December 14, 2000 with Dr. Dick Geis. The history given to Dr. Geis shows that claimant may have twisted his left knee when he stepped in a hole. His records also show an injury date of November 29, 2000. Dr. Geis diagnosed a torn meniscus and referred claimant to Dr. Wallace, an orthopedic surgeon. Claimant was seen by Dr. Wallace on December 18, 2000. The date of injury shown in Dr. Wallace's records is likewise November 29, 2000. However, claimant's Application for Hearing dated January 29, 2001 and filed February 13, 2001 alleges he injured his left knee when he

stepped into a hole on December 4, 2000. Claimant's Application for Preliminary Hearing dated February 13, 2001 and filed February 15, 2001, likewise alleges a December 4, 2000 accident.

At the April 4, 2001 preliminary hearing, claimant testified that he injured his knee when he stepped in a hole. At page 9 of the Preliminary Hearing Transcript claimant was asked if that occurred on December 4, to which he answered: "About that. I can't remember exactly. I thought I just sprained it. I mean, I said something to the acting supervisor that day, but I kind of kept going." Claimant later testified that his accident probably occurred on November 29, 2000, like he told the treating physicians, rather than December 4. One of claimant's supervisors, Jeff Piersol, testified that claimant did not work on December 4 but did work on November 29, 2000.

Claimant testified that he was removing concrete forms from the walls around a tank when he stepped back into a hole. He described the hole as about 18 inches deep. Although his knee hurt, claimant thought it was just sprained and continued working. He did not seek medical treatment. Claimant did mention to the assistant superintendent, J. C. Parkin, that he stepped in a hole, but he did not ask him for medical treatment that day. Claimant testified that about a week later when his knee had not improved he informed the superintendent, Mr. Piersol, about the injury and requested medical treatment.

Respondent presented the testimony of Mr. Piersol. He confirmed that he was the superintendent on the job where claimant worked and that J. C. Parkin was an assistant superintendent. According to respondent's records, claimant worked on November 29, 2000 but did not work on December 4, 2000. Mr. Piersol did not hear about claimant's accident until December 12 when claimant came to him and asked for medical treatment. Mr. Piersol said that he did not receive a report of injury from the assistant superintendent, Mr. Parkin, but that he prepared an accident report after claimant reported the injury to him. According to Mr. Piersol the need to file an accident report is triggered when the injury needs medical attention. Accordingly, it would be consistent with this policy for Mr. Parkin not to have filed an accident report when claimant reported his knee injury on the day that it happened but did not request medical treatment. Mr. Parkin did not testify at the preliminary hearing.

Claimant testified that he was working with two Mexicans on the date of his accident, one was named Ramiro and the other Francisco. Respondent presented the testimony of one of these two co-workers, Francisco Florez. Mr. Florez testified through an interpreter that he first became aware of claimant's knee injury after claimant was placed on light duty and was working in the trailer office. Mr. Florez thought that this was on November 1 but said it could have been December, he was not sure. He did not recall having seen

claimant fall into a hole at the job site. The ALJ made a comment to the effect that he found Mr. Florez' testimony to be of little value. The Board agrees that the language problems combined with Mr. Florez' hazy recollections, especially about dates, makes his testimony unreliable. Furthermore, claimant did not testify that Francisco witnessed his accident, only that he discussed it with him later.

Respondent presented the testimony of another of claimant's co-workers, Bobbie Jo Pollard, primarily to relate a so-called "race" that she had with claimant during the week of December 4, 2000. According to Ms. Pollard, on Thursday of that week she and claimant jogged about 30 feet to the trailer. Although Ms. Pollard initially said that they raced 30 feet to the trailer and claimant "won", she later clarified that they were jogging, not running. Although claimant was not questioned about this incident, claimant said he was able to continue to perform his regular job duties as a carpenter after his accident. Respondent apparently offered this testimony for the proposition that it would be inconsistent for someone with a knee injury to run or jog. While this may be true, claimant was able to continue to perform his regular job duties. Thereafter, claimant sought medical treatment from his employer on December 12, 2000 because the knee condition was not getting better as he had expected if it had only been a sprain. While it may be unexpected, it is not inconceivable that claimant would have jogged 30 feet on Thursday, December 7, 2000, after suffering a knee injury the week before that had not prevented him from working. Even after the torn meniscus was diagnosed, Dr. Wallace did not take claimant off work. Instead, he imposed restrictions of light to medium work with occasional lifting up to 35 pounds, frequent lifting up to 15 pounds and constant lifting up to 7 pounds. Claimant was also given restrictions of no squatting, no climbing and working only on level, even ground and carrying was to be occasional, two or three times an hour.

The ALJ apparently found claimant's testimony credible because he awarded benefits. The Appeals Board agrees. Other than claimant's confusion concerning the specific accident date, his testimony is consistent and believable. Although there is a certain incongruity concerning the so-called "race" with the co-worker, none of respondent's witnesses directly contradict any of claimant's testimony. Moreover, respondent does not refute that claimant reported his accident on the date it occurred to the assistant superintendent. The assistant superintendent to whom claimant reported the accident on November 29, 2000 did not testify. The Appeals Board finds claimant has proven he suffered personal injury by accident arising out of and in the course of his employment on or about November 29, 2000.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict, dated April 5, 2001, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of July 2001.

BOARD MEMBER

c: Roger D. Fincher, Topeka, KS
Wade A. Dorothy, Lenexa, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director